A

DANAHARTA URUS SDN BHD

v.

HIPA CORPORATION SDN BHD & ANOR

B

HIGH COURT SABAH & SARAWAK, TAWAU
LINTON ALBERT J
[ORIGINATING SUMMONS NO: T(24)-37-2003]
1 MARCH 2005

C ***LAND LAW:*** *Charge - Order for sale - Locus standi - Whether second defendant had interest in issues raised in proceedings - Certificate of indebtedness, whether conclusive - Whether binding on parties - Pengurusan Danaharta Nasional Berhad Act 1998, s. 14(6)(i) - Whether interpreted to include plaintiff - Whether there was non*
D *compliance with O. 83 r. 3 of the Rules of the High Court 1980*

The first defendant purchased from the second defendant the property consisting of a parcel of land in Tawau together with the hotel building thereon ('the property'). The first defendant
E obtained a loan from Bank Bumiputra Malaysia ('the bank') to purchase the property which was sold for RM22,000,000. The purchase price was fully paid by the first defendant with the aid of the loan totaling RM16,000,000. A memorandum of transfer was executed to transfer the property from the second defendant
F to the first defendant and a memorandum of charge in favour of the bank was also executed by the first defendant as security for the loan. The plaintiff acquired from the bank all its powers, rights, interests and title in the property pursuant to and by virtue of a vesting certificate dated 31 July 1994 issued under s. 14 of the
G Pengurusan Danaharta Nasional Berhad Act 1998 ('the Act'). A winding up order was made against the first defendant on 22 February 2001 which prompted the plaintiff to require immediate repayment of the amount outstanding under the loan. The first defendant failed to repay the loan. The plaintiff
H commenced these proceedings under O. 83 of the Rules of the High Court 1980 ('RHC') by way of originating summons dated 30 June 2002 asking for an order to sell the property. Among the numerous consequential reliefs asked for was an order for the first and second defendants to deliver or cause to be delivered vacant
I possession of the property. The second defendant opposed the plaintiff's application and filed an affidavit deposed to by one Datuk Hiew, its director. The issues that arose were (1) whether

the second defendant lacked *locus standi* because it had parted with the property by having executed the memorandum of transfer in favour of the first defendant and was just a bare trustee; (2) whether the certificate of indebtedness issued by the plaintiff was conclusive of the indebtedness and was binding on the parties; (3) whether the words "any other person'' in s. 14(6)(i) of the Act included the plaintiff and (4) whether there was non compliance with O. 83 r. 3 of the RHC.

Held (allowing plaintiff's application):

[1] The second defendant had no interest in the issues raised in the proceedings because it was not suggested that second defendant had any interest in either the debt or the property. The second defendant did not have the standing to question the existence of the proved debt due from the first defendant to the plaintiff. (paras 6 & 7)

[2] The certificate of indebtedness issued by the plaintiff was conclusive of the indebtedness because it was issued by virtue of s. 16.10 of the facilities agreement between the bank and the first defendant pursuant to the loan and was binding on the parties. The criticism made by the second defendant as to the correctness of the debt and how it was arrived at were caught by s. 14(6)(i) of the Act. (para 8)

[3] Whether the words "any other person'' in s.14(6)(i) of the Act included the plaintiff could be resolved by resorting to *Danaharta Urus Sdn Bhd v. Kekatong Sdn Bhd*. Section 14(6)(i) was interpreted to include the plaintiff in order to fulfil the purpose of the Act. The plaintiff's reliance on s. 14(6)(i) was therefore justified. (paras 9 & 10)

[4] Although there was merit in the contention that there was non compliance with O. 83 r. 3 of the RHC 1980 because the certificate of indebtedness fell short of its requirements, this was not fatal to the plaintiff's case. The omissions could not be said to have prejudiced the second defendant. The second defendant's objection on this ground must therefore fail. (para 12 & 14)

Case(s) referred to:

Borneo Housing Mortgage Finance Bhd v. Time Engineering Bhd [1996] 2 CLJ 561 FC ***(refd)***

Citibank NA v. Ibrahim Othman [1994] 1 MLJ 608 ***(refd)***

Citibank NA v. Ooi Boon Leong [1981] 1 MLJ 282 ***(refd)***

Danaharta Urus Sdn Bhd v. Kekatong Sdn Bhd [2004] 1 CLJ 701 FC ***(refd)***

Maunsell v. Orlins [1975] AC 373 ***(refd)***

Ng Hee Thoong & Anor v. Public Bank Bhd [1995] 1 CLJ 609 CA ***(refd)***

United Engineers (M) Bhd v. Lim Kit Siang [1988] 2 MLJ 12 ***(refd)***

Legislation referred to:

Pengurusan Danaharta Nasional Berhad Act 1998, s. 14(6)(i)

Rules of the High Court 1980, O. 1A, O. 83 r. 3

For the plaintiff - Norbert Yapp; M/s Jayasuriya Kah & Co

For the 1st defendant - Henry Mello

For the 2nd defendant - Cecil Robertson; M/s C Robertson

Reported by Suhainah Wahiduddin

JUDGMENT

Linton Albert J:

[1] The first defendant purchased from the second defendant the property consisting of a parcel of land situated in Tawau and described as Town Lease No. 107524943 together with the hotel building thereon. The first defendant obtained a loan from Bank Bumiputra Malaysia Berhad (the bank) to purchase the property which was sold for RM22,000,000. The purchase price was fully paid by the first defendant with the aid of the loan totaling RM16,000,000 disbursed in October 1994. A memorandum of transfer was executed to transfer the property from the 2nd defendant to the 1st defendant and a memorandum of charge in favour of the bank was also executed by the 1st defendant as security for the loan. The two documents were not registered with the Central Land Office although the latter was duly registered with the Registrar of Companies and the certificate of registration of charge duly issued. The title deed to the property was also deposited with the bank. It is not disputed that in these circumstances there was then an equitable charge on the property and the 2nd defendant was a bare trustee having no beneficial interest whatsoever in the property, the 2nd defendant having divested itself of all its interest in the property (see *Borneo Housing Mortgage Finance Bhd v. Time Engineering Bhd* [1996] 2 MLJ 12).

[2] The plaintiff acquired from the bank all its powers rights interest and title in the property pursuant to and by virtue of a Vesting Certificate dated 31 July 1994 issued under s. 14 of the Pengurusan Danaharta Nasional Berhad Act 1998 (the Act). A winding-up order was made against the 1st defendant on 22 February 2001 which prompted the plaintiff to require immediate repayment of the amount outstanding under the loan. The first defendant failed to repay the loan.

[3] The plaintiff commenced these proceedings under O. 83 Rules of the High Court 1980 (RHC) by way of originating summons dated 30 June 2002 asking for an order to sell the property and among the numerous consequential reliefs asked for was an order for the 1st and 2nd defendants to deliver or cause to be delivered vacant possession of the property. These were the only matters that could conceivably concern the 2nd defendant and was accordingly so joined for those purposes.

[4] Perhaps with a view to avoid the expenses incurred and delay caused by these proceedings the plaintiff was quick to grab the opportunity when it was suggested by one Datuk Hiew Min Yong (Datuk Hiew) the Chief Executive of the 2nd defendant that a related company was in the process of obtaining an offshore loan which would be utilized to pay off the 1st defendant's debt. Apart from causing the lengthy delay, nothing came out of the efforts to reach an amicable settlement although in the process the plaintiff managed to squeeze some payments from Datuk Hiew and the 2nd defendant towards payment of part of the interest due on the debt but the total amount was too minute to be of any significance.

[5] The 2nd defendant opposed the plaintiff's application and filed an affidavit deposed to by Datuk Hiew who was also its director. Datuk Hiew's affidavit dealt almost exclusively with the unsuccessful efforts taken to reach an amicable settlement and the events which took place. The last paragraph of Datuk Hiew is relevant because it embodies the 2nd defendant's opposition to the application and is, therefore, reproduced:

> The Plaintiffs claim of RM27,722,371.81 by their exhibit KA-9 is not admitted, nor is it evidence of proved debt due to the Plaintiff by the 1st Defendant. In the circumstances, I am advised and verily believe that the Plaintiff is not entitled to the Orders it seek by this Originating Summons.

[6] The response to this was the argument advanced by learned counsel for the plaintiff that the 2nd defendant lacked *locus standi* because it had parted with the property by having executed the memorandum of transfer in favour of the first defendant and was just a bare trustee. Additionally, it was argued that the debt sought to be recovered by the sale of the property was that which was owed by the 1st defendant to the plaintiff. The debt was not disputed by the 1st defendant and these proceedings relate to the debt due from the 1st defendant to the plaintiff and the property which the plaintiff seeks to sell to recover the debt. It stands to reason that the 2nd defendant has no interest in the issues raised in the proceedings because it is not suggested that the 2nd defendant has any interest in either the debt or the property. In *United Engineers (M) Berhad v. Lim Kit Siang* [1988] 2 MLJ 12 Abdul Hamid CJ (Malaya) had this to say at p. 39:

> First, apart from certain cases in which standing to sue is in the discretion of the Court, the Plaintiff must possess an interest in the issues raised in the proceedings.

[7] In my view this principle applies with equal force to a defendant in court proceedings and, in the words of Salleh Abas, LP in that case, this is to protect the "judicial process from abuse by busy-bodies, cranks and other mischief-makers" (at p 29). It is patently clear that in the circumstances, the 2nd defendant does not have the standing to question the existence of the proved debt due from the 1st defendant to the plaintiff. The plaintiff's response is, therefore, not without merit and is therefore sustained.

[8] Contrary to the views expressed by Cecil Robertson, counsel for the 2nd defendant, I am inclined to agree with the submission of Norbert Yap, learned counsel for the plaintiff, that the certificate of indebtedness issued by the plaintiff was conclusive of the indebtedness because it was issued by virtue of section 16.10 of the facilities agreement between the bank and the 1st defendant pursuant to the loan and was binding on the parties (see *Citibank Na v. Ooi Boon Leong & Ors* [1981] 1 MLJ 282). The criticism made by the 2nd defendant as to the correctness of the debt and how it was arrived at are, in my view, caught by s. 14(6)(i) of the Act which reads:

> Without prejudice to the generality of subsection (1), (2), (3), (4), or (5), in any proceedings brought by or against the Corporation in respect of any asset vested in the Corporation pursuant to this section, no person shall raise as a claim or defence to such

proceedings any of the following matters, unless such claim is a disclosed claim:

(a) ...

(b) ...

(c) ...

(d) ...

(e) ...

(f) ...

(g) ...

(h) ...

(i) there is an error in any statement of account issued by the seller or any other person in respect of any debt to which the asset relates.

[9] The contrasting views expressed by Mr. Norbert Yapp and Mr. Cecil Robertson concerning whether the words "any other person" in s. 14(6)(i) of the Act includes the plaintiff can be resolved by resorting to *Danaharta Urus Sdn Bhd v. Kekatong Sdn Bhd* [2004] 1 CLJ 701 a case of high authority cited by Mr. Norbert Yapp where at p. 739 Augustine Paul JCA delivering the judgment of the Federal Court said:

> Parliament's clear intention in enacting the Act was to ensure that the acquisition of non-performing loans by the appellant would ease the pressure upon banks and other financial institutions with the appellant being entrusted with the task, as the nation's Asset Management Company, to take over these bad loans (together with securities, where available) with a view to maximize recovery values. The appellant was thus given three principal duties. They are:
>
> (a) acquisition of non-performing loans and assets;
>
> (b) management of such assets, including by way of the appointment of Special Administrators to temporarily manage the affairs of corporate borrowers in place of their directors; and
>
> (c) disposition of the acquired assets.

A In order to accomplish these objectives the appellant was given sufficiently wide and broad statutory powers to acquire loans and credit facilities by way of statutory vesting; to manage the affairs of corporate borrowers through special administrators appointed to formulate work-out plans in order to repay debts owing to creditors, and finally to dispose of charge assets.

B

[10] It seems to me sensible that s. 14(6)(i) is interpreted to include the plaintiff in order to fulfil the purpose of the Act, a proposition consonant with the dictum of Lord Simon of Glaisdale in *Maunsell v. Orlins* [1975] AC 373 at p 391:

C

... in statutes dealing with ordinary people in their everyday lives, the language is presumed to be used in its primary ordinary sense, unless this stultifies the purpose of the statute, or otherwise produces some injustice, absurdity, anomaly or contradiction, in which case some secondary ordinary sense may be preferred, so as to obviate the injustice, absurdity, anomaly or contradiction or fulfil the purpose of the statue:

D

[11] The plaintiff's reliance on s. 14(6)(i) was, therefore, justified.

E **[12]** Although there is merit in Mr. Cecil Robertson's contention that there was non-compliance with O. 83 r. 3 of the RHC 1980 because the certificate of indebtedness fell far short of its requirements, this is not fatal to the plaintiff's case. In *Citibank NA v. Ibrahim bin Othman* [1994] 1 MLJ 608 an authority cited

F by the 2nd defendant's counsel it was held that the objective of O. 83 r. 3 is to enable the defendant to know at least at the date the originating summons is filed, what is the exact sum he is legally liable to pay so that he can make up his mind to contest or pay up. Mahadev Shankar, J went on at p 615 to state thus:

G Provided evidence of the correct amount due has been put before the final hearing, the court has the power to dispense some omission to fulfil the rules to the letter, but only if no real prejudice will thereby result to the defendant.

H **[13]** Order 1A RHC 1980 also provides:

In administering any of the rules herein the court or a judge shall have regard to the justice of the particular case and not only to the technical non-compliance of any of the rules herein.

I **[14]** The omissions here cannot by any stretch of the imagination be said to have prejudiced the 2nd defendant. The 2nd defendant's objection on this ground must therefore, fail. I have not considered the speculative opinions expressed by the 2nd

defendant's counsel relating to the propriety of not having the memorandum of charge registered and the applicability of the Sabah Land Ordinance (Cap 68) to these proceedings because these were matters that were not pleaded (see *Ng Hee Thoong & Anor v. Public Bank Bhd* [1995] 1 CLJ 609) nor are they relevant for the determination of the plaintiff's application.

[15 I have for the reasons and in the circumstances aforesaid, allowed the plaintiff's application.